UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, : 08-CR-640

v. : U.S. Courthouse
Brooklyn, New York

ROBERT SIMELS, :
ARIENNE IRVING, August 6, 2009
Defendants. : 2:00 o'clock p.m.

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TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE JOHN GLEESON
UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES:

For the Government: BENTON J. CAMPBELL
United States Attorney
By: STEVEN L. D'ALESSANDRO
MORRIS FODEMAN
DANIEL BROWNELL
Assistant U.S. Attorneys

For the Defendants: GERALD SHARGEL, ESQ.
EVAN L. LIPTON, ESQ.
For Robert Simels

JAVIER A. SOLANO, ESQ.
LAWRENCE BERG, ESQ.
For Arienne Irving

Court Reporter: Anthony M. Mancuso
225 Cadman Plaza East
Brooklyn, New York 11201
(718) 613-2419

Proceedings recorded by mechanical stenography, transcript produced by CAT.

(Trial resumed.)

(In open court; jury not present.)

THE COURT: Good afternoon.

MR. D'ALESSANDRO: Good afternoon, your Honor.

MR. SHARGEL: Good afternoon, your Honor.

THE COURT: Okay.

MR. SHARGEL: Your Honor, I don't know if he's appeared before. This is Ross Kramer, who is another associate from my office.

THE COURT: Hi.

MR. KRAMER: Hi, Judge.

THE COURT: Nice to meet you.

Okay. I circulated a draft. There's already a couple of things that I'm inclined to think -- a couple of ways I'm inclined to tinker with it, I'll just tell you up front, and everything I say is subject to whatever comments or objections you might have.

But I've included the -- kind of short form of the government's theory of each of these counts and the defense theory. I think I left out the defense theory on the nontampering counts, but I'll add it in, if you want it.

The thing I want to add is, I think it's important up front to tell the jury. I don't want the jury to start to think that the question is, which side has the better case. I'll emphasize up front that although the defense theory is

set forth, it's at all times the government's burden to prove guilt beyond a reasonable doubt. I think that probably bears a little emphasis.

And I want to talk to you -- let's not adjourn until we talk about -- you see, I have not included anything in the proposed charge about the suppression of the Title III. I don't think I should. But I'm curious as to how you're going to argue it, Mr. Shargel.

I think two things ought to happen. One is, the jury shouldn't know or be told, even in an indirect way, there was a motion to suppress that was granted.

Second, I don't think the defendant ought to be allowed to make unfair advantage of that fact in your argument. So, I'm going to talk to you about how you intend to argue that.

MR. SHARGEL: I can tell you in one sentence.

THE COURT: Go ahead.

MR. SHARGEL: I'm going to simply argue it's inaudible and it has no evidentiary weight. I'm not talking about the timing of it. I'm not talking about anything about it other than it's inaudible.

THE COURT: All right. There are other arguments I could imagine that might cause the government to bristle a little bit, because the tapes are unavailable through a defendant's motion. That doesn't strike me as one. You

agree?

MR. D'ALESSANDRO: Yes, your Honor.

THE COURT: Comments, objections, to the proposed draft?

MR. SHARGEL: Who should go first?

THE COURT: Who wants to go first?

MR. D'ALESSANDRO: I can make some -- share some of my thoughts. One was, as a testament to my continued struggle to capture the English language, I mistakenly used i.e. where we should have used e.g., for example. I didn't want there to be constriction. This is the essence of what the government's theory is, where we gave examples of the conformity.

For example, on page 15, the parenthetical which talks about the theory of the case, i.e., we intended to use e.g. it's not exhaustive. It's not an exhaustive list. So, my point is, where the government had these parentheticals identifying the defense's theory of the case.

THE COURT: If that said e.g., how long would the list be?

MR. D'ALESSANDRO: I don't know it would be that much longer, and I don't think there's going to be anything out of left field that the defense is going to get on surprise.

MR. SHARGEL: I'm not sure -- you're thinking that this may be limiting your argument?

MR. D'ALESSANDRO: Yes.

MR. SHARGEL: I don't get that from whether it's e.g. or i.e.

THE COURT: I'll just say "for example." I wouldn't say "i.e.," anyway.

MR. D'ALESSANDRO: That was my point.

MR. SOLANO: On that point, I'm afraid that the jury might speculate that there might be something else out there that's not in the record. If the list is not that much longer, maybe the best thing to do is to have them --

THE COURT: You want to catalogue the entire list of ways, have a laundry list of things from which the jury might select, as though it were a Chinese menu?

MR. SOLANO: One second, your Honor.

(Pause.)

MR. SOLANO: I'll withdraw that, your Honor.

THE COURT: All right.

What else?

MR. D'ALESSANDRO: I apologize. I'm trying to go through this in order.

On page fourteen, where you are instructing the jury about what's permissible for an attorney to do, this obviously explains what attorneys are permissible to do. I think it bears some discussion. From the government's view, there should be some things that are in there on what are

impermissible, which were discussed. The last sentence, for example, it says: "It is also permissible for an attorney to retain an investigator to locate potential witnesses and to make payments to obtain information, as long as such payments are not made to influence a witness's testimony in court."

That's correct.

But, if we look at the 201 charge, there doesn't have to be any intent to influence witnesses. The federal law is very clear that you can't pay a witness beyond reasonable fees. I'm not trying to get a more convoluted charge here. That's an example of where I don't think it's as inclusive as to what is permissible and impermissible.

There's also a question of whether your Honor would permit instructions about it would be impermissible to contact a witness once they have expressed, either directly or through their attorney, they don't want to have contact with you anymore.

THE COURT: Did that happen here?

MR. D'ALESSANDRO: It's an argument in play with Vijai Jagnarain, also known as "Son."

THE COURT: So, what do you want me to add?

MR. D'ALESSANDRO: Well, I would request that there be a charge with regards to the contact, that it would be impermissible for an attorney to seek to contact a potential witness where they had been instructed that they do not want

to be contacted, either directly or through their attorney, words and substance.

THE COURT: I don't think it's necessary.

What else?

MR. D'ALESSANDRO: Well, again, in regards to the language of payments to influence a witness's testimony as opposed to --

THE COURT: This charge really only pertains to One through Nine. It doesn't pertain to the bribery charge, in any event; right?

MR. D'ALESSANDRO: To the extent, your Honor, what we're addressing is, what's lawful conduct. It would not be lawful conduct to pay a witness beyond reasonable expenses. Clearly, it would be, in the truest sense, bribery if you did it with the intent to influence their testimony.

But also, it would still be illegal if you didn't intend to influence their testimony but you paid them $10,000 when there's no justifiable reason to pay them, even if you paid for truthful testimony that cost $10,000.

THE COURT: Wouldn't the jury infer that would be to influence testimony, in any event?

MR. D'ALESSANDRO: I think that's a fair argument, your Honor.

THE COURT: Denied.

MR. D'ALESSANDRO: With regards to -- there's some

typographical errors.

THE COURT: Good for catching them.

MR. D'ALESSANDRO: Would you like me to e-mail those?

THE COURT: You can tell me now.

MR. D'ALESSANDRO: On page 16, the second line of Count Five, "Vijay" is with an I. It's there with a Y. It should be with an I.

MR. SHARGEL: Do you send the written charge to the jury?

THE COURT: No.

I don't mean to digress. I may as well tell you what I normally do. I don't like them to get the charge. If they ask for it, then I usually send it in, but I think it turns them into mini lawyers. I think that instruction about taking the charge as a whole and not any one instruction individually, you run the risk that they avoid that, that they don't follow that once you send it in. Once, I had a jury, one of them turned into like a little lawyer. I prefer them not to have it, although if they ask for it, I'll send it in.

MR. D'ALESSANDRO: Going earlier, your Honor, on page nine, the last line, David Clark. "David" is there with an E.

THE COURT: Okay.

MR. D'ALESSANDRO: On page 17, your Honor, Count

Six, the first line doesn't have the defendant. It just says "Robert Simels." Count Six.

THE COURT: Yes.

MR. D'ALESSANDRO: Again, if this is not going back to the jury, I apologize for spotting these with no meaning. Page 20, the first line for Count Eleven, the word "on" is capitalized.

THE COURT: Okay.

MR. D'ALESSANDRO: On page 21, the line right before Count Twelve, I believe the last word should be "department." It just says "The statement must concern an authorized function of that."

THE COURT: You want that to be a complete word?

MR. D'ALESSANDRO: Yes, your Honor. That's the government's application.

I raised this issue with Mr. Shargel about the wiretapping equipment. There's no definition of wire communication. I don't know if it is, at the end of the day, necessary to in explain it to them, or if we can just agree that you can instruct the jury that wire communications includes cellular telephone calls.

THE COURT: Any objection?

MR. SHARGEL: No objection.

THE COURT: Where would that go?

MR. D'ALESSANDRO: I believe it would fit on

page 22. You can just insert it right before where Count Thirteen begins.

THE COURT: "Wire communications includes cellular telephone calls"?

MR. D'ALESSANDRO: Yes.

THE COURT: Okay.

Was that correspondence from Ms. Peterson, directing the defendant to provide this equipment, on which these recordings were made?

MR. D'ALESSANDRO: I think at the beginning of the second day of Mr. Simels's testimony, there was -- as I understood the testimony -- the tapes related to the Felix calls, and the defendant testified that that was hardwired equipment. Those are different than some other conversations. So, there was, as I understood the testimony -- perhaps Mr. Shargel, since he has access to his client, could articulate this. There was Felix calls and David Clark calls. David Clark calls are on the equipment we have. Felix calls were hardwired, like a splice into the telephone lines.

What was disclosed were the Felix calls, not the David Clark calls, so that when there was a demand by the government for the equipment, he didn't have the equipment that was in Guyana from the Felix calls. He had equipment for the David Clark calls.

MR. SHARGEL: I don't know that that's a question

that your Honor had. I think the question is, if I have this right, whether the government was asking to have access to the equipment and what the letters show, and the best thing would be to show you the letters. We can get them over to you this afternoon.

But what the letters show is that the prosecutors in the Khan case were asking for the originals, the opportunity to inspect -- I don't think they said in haec verba, "Give us the equipment." They said, What kind of equipment was this on? And our position is that this was brought to the United States for no reason other than it may be necessary to get this in evidence. It's not an authorization defense, because --

THE COURT: I understand, I think.

Were those requests related to the Clark calls, not just the Felix calls?

MR. SHARGEL: Yes, the Clark calls. Remember, there was a transmittal letter that said, I'm including four CD's. That included both the Clark calls and the Felix calls. And the equipment, if I remember, the equipment that obtained the Clark calls was the equipment that's in issue here.

THE COURT: Anything else on the charge?

MR. D'ALESSANDRO: Page 24, your Honor, there's a parenthetical at the end of the second full paragraph. You refer to drugs and the weapons and ammunition going back to

the jury. Don't make promises you can't keep.

THE COURT: The miracle of word processing. So, there's no drugs. I suppressed the weapons, and there's no ammunition; right?

We'll take that out. And herein lies another reason not to give the jury a copy of the charge.

MR. SHARGEL: Both sides caught that. We were not letting that happen.

THE COURT: All right.

Mr. Shargel, Mr. Solano.

MR. SHARGEL: Yes.

Page seven.

THE COURT: Yes.

MR. SHARGEL: I believe that with regard to a paid informant, the charge should be the same as with an accomplice witness, that the testimony of such a witness should be scrutinized more carefully, that the caution-and-care language that would accompany an accomplice witness.

THE COURT: The same principles apply.

I'll hear you, Mr. D'Alessandro, if you want to be heard. I'll add something to this about the need to scrutinize the testimony more carefully because of the relationship with the government. Any objection?

MR. D'ALESSANDRO: No, your Honor.

MR. SHARGEL: I also object, in that same section, I

object to the language "Indeed, certain types of evidence would be extremely difficult to detect without the use of such informants."

I am seeing this for the first time now. I'm thinking back to the reasonable doubt charges that were condemned by the Second Circuit. I'm giving it to you paraphrased: There would be few convictions if the standard of proof was proof beyond all doubt. I don't think this really adds anything, and this kind of gives your imprimatur to the use -- I'm not going to argue that the proposition is not lawful. To have to tell the jury that this is important, to pay people like this, I think is wrong.

THE COURT: Any objection?

MR. D'ALESSANDRO: May we confer one moment?

(Pause.)

MR. D'ALESSANDRO: Obviously, from the government's position, we think it's fair for the jury to have this. I think it reinforces what we've all strived for during this trial about the assymetry -- it's the assymetry that was present and the similarities between what's a proper defense of the sting, and how it mirrors some of the types of investigations that were used by the government here. I don't think it would give the inference to the jury anything other than what it's intended to do, just to explain to them in very clear terms that it's permitted and the reason why we use it.

THE COURT: I'm going to take it out. You can argue that. The previous sentence gets you what you need.

MR. SHARGEL: In connection with the conspiracy, I would ask that somewhere, the jury be told that Selwyn Vaughn is an ineligible conspirator, that you can't conspire -- the agreement could not be with Selwyn Vaughn.

THE COURT: All right. I'll add that.

Hang on one second.

(Pause.)

THE COURT: After the second sentence, under -- on page ten -- under "Existence of the agreement," after the word "alone," which concludes the second sentence, I'll add, "Nor, I should add, can someone conspire with an undercover agent or informant such as Selwyn Vaughn. Rather, the proof must convince you that at least two persons, not including Vaughn, joined together"; right?

MR. SHARGEL: Yes.

THE COURT: Go ahead.

MR. SHARGEL: On page 13 -- this may just be a matter of linguistics, but I'm struggling with this a little bit -- the part where you say --

THE COURT: Where are you?

MR. SHARGEL: Six lines from the bottom.

-- "You heard from Anthony Ricco on the subject of representing defendants in criminal cases. In considering

this conspiracy charge in Count One, and in considering all of the attempted witness-tampering charges" -- I don't have to read the whole thing. It should read: "You heard, actually, from all testimony in the case, from all the evidence in the case" --"and all the evidence in the case should be considered on the question of whether the government proved beyond a reasonable doubt that this did not constitute lawful, bona fide legal representation."

THE COURT: So four lines up from the bottom, why don't I say: "You may consider that testimony along with all the other evidence in the case"?

MR. SHARGEL: Fine.

One more thing, if I may?

THE COURT: Any objection, Mr. D'Alessandro?

MR. D'ALESSANDRO: No, your Honor.

MR. SHARGEL: I would ask that it continue: "In considering this conspiracy charged in Count One, and in considering all of the attempted witness-tampering charges I'll be discussing in a few moments, you may consider that and all the other evidence in the case."

Going into the next sentence: "In determining whether the government has proven beyond a reasonable doubt the elements of the particular charge and beyond a reasonable doubt the conduct of the defendant you are considering did not constitute lawful bona fide legal representation."

My point is, that it's not one thing. We should break this down. Even if they were to prove -- and I think you say this later -- even if they were to prove the elements of the offense beyond a reasonable doubt, they still have a separate task, because of the statutory defense, there's a separate task of proving beyond a reasonable doubt the rest of it.

THE COURT: I understand.

I think that "beyond a reasonable doubt" that's there travels far enough along the sentence that makes it sufficiently clear.

MR. SHARGEL: Very well.

THE COURT: What else?

MR. SHARGEL: Judge, as you know, there were simultaneous submissions this morning at 10:00 o'clock as to our versions of the offense. We didn't have the chance to see each other. I would like to tinker with our version of the offense by changing essentially one word.

In each of the -- in each presentation of the theory of the defense, we say "intend to have Selwyn Vaughn," and then it continues.

THE COURT: Right.

MR. SHARGEL: We would like to say --

THE COURT: "Intend to cause."

MR. SHARGEL: "Did not attempt to have Selwyn

Vaughn. In other words, the mirror image of the government's attempt language.

THE COURT: "Did not attempt to cause Vaughn to threaten?"

MR. SHARGEL: Yes.

THE COURT: All right. We changed all those "intends" to "attempts." And you'll see this again before I deliver it.

So, for example, let's just get one context down.

On page fifteen, in Count Two, the third lineup, before we get to Count Three, "He further contends that he did not attempt to cause Vaughn."

MR. SHARGEL: Yes.

THE COURT: Okay.

MR. SHARGEL: Page 19 -- I don't have a whole lot more. Page 19.

THE COURT: Yes.

MR. SHARGEL: I would ask that before you get to affirmative defense --

THE COURT: I changed your mind on this overnight, I noticed.

MR. SHARGEL: Yes.

The trial of a criminal case is a fluid proposition.

THE COURT: It is.

MR. SHARGEL: On page 19, Simels argues, the next

sentence, "He argues that Singh was not a potential witness at Khan's trial." In light of what I received from the government, I would like to put a period there.

THE COURT: Slow down. Where do you want to put a period?

MR. SHARGEL: "He argues that Singh was not a potential witness at Khan's trial."

THE COURT: Were you within the "Truth-seeking lawful conduct"?

MR. SHARGEL: No. Right above that subheading.

THE COURT: Go ahead.

MR. SHARGEL: I would like to put a period after "trial."

THE COURT: All right.

MR. SHARGEL: I want it to stop there.

THE COURT: Now, I understand.

Any objection?

MR. D'ALESSANDRO: No.

MR. SHARGEL: I found a typo. The fourth line down in the affirmative defense.

THE COURT: Yes.

MR. SHARGEL: The defense is referred to as"truth-seeking defense" as opposed to "the."

Judge, on the bottom of one on to twenty, when you define preponderance of the evidence, never having tried a

civil case, I don't know how you instruct the jury, but it would seem to me that -- it would seem to me that the definition that really tells the jury what this is about is that it's fifty-one percent. In other words, if it's tipped at all in favor of the defendant, he prevails, and fifty-one percent, as far as I know, essentially defines what the preponderance of the evidence standard is.

Here, you say "If it's an imbalance, then you resolve it against Mr. Simels." So, just a tiny bit off, over.

THE COURT: I'll consider adding a little bit more language in there. I'm not going anywhere near percentages. Then the next question for the jury, What's the percentage for beyond a reasonable doubt? We're not going there.

MR. SHARGEL: It's a metaphysical discussion.

THE COURT: Right.

MR. SHARGEL: Here is a big-ticket item. I understand that in the bribery charge, there is no need to prove a corrupt intent or influencing the witness's testimony. I understand all that. But my position is that there has to be an actual intent to make an offer, as opposed to a ruse or trick.

THE COURT: Understood.

MR. SHARGEL: And I think that that has to be made clear.

As your Honor stated at the beginning of this conference, you did not include our defense theory here, and I would ask that the defense theory be added.

THE COURT: I intend to add them all.

MR. SHARGEL: Very well.

THE COURT: Is that what's in there?

MR. SHARGEL: Yes. I say: "As to Count Ten, Robert Simels argues that he did not intend to pay a bribe to Leslyn Camacho, and that the words spoken to Vaughn were a ruse to induce Camacho to come to his office."

THE COURT: In fairness to the government, since I left out -- I was focusing on Counts One through Nine. I left out the defense-theory proposals with regard to Counts Ten through Thirteen, and they are right here.

Do you have any objection to these?

MR. D'ALESSANDRO: We didn't --

THE COURT: I'm going to include them. I really don't want you to save your arguments and your big-ticket items, as you put it, until Monday. This is not your last crack at seeing this. If you have some problem with this and want to bring it to my attention before the end of the day tomorrow, and, really, any other changes, like switch back on the affirmative defense again, let me know tomorrow. I'll include these.

But, Mr. Shargel, I take it your proposal is not

just to include your defense theory, but to tinker with the language that's already in the Count Ten instructions; right?

MR. SHARGEL: Because I would ask for --

THE COURT: Where was it in here?

MR. SHARGEL: Page 20. It's before "False statement to the United States." It's the sentence that says "The bribery statute makes no distinction between offering, promising or giving a bribe. The mere offer or promise of a bribe."

That's true as far as it goes. My position is merely uttering the words is not enough. That's our defense.

THE COURT: I understand. I'll hear from the government, if you have a different view. Maybe what I ought to do is, add your theory and just finish that by saying "The government must prove beyond a reasonable doubt that Simels intended to make an offer of a bribe to Camacho through Vaughn." That's what you want?

MR. SHARGEL: Correct.

THE COURT: I think that's right.

MR. D'ALESSANDRO: Absolutely.

THE COURT: That's what we'll do, then.

(Continued on next page.)

THE COURT: What else? You call that a big ticket item? It goes to show you how good my law clerk is.

What else?

MR. SHARGEL: I may be done. Give me one more moment.

A little typo on 22. The middle of the page, under possession of eavesdropping equipment. The end of the third -- purposes, for this purpose. You put plural.

THE COURT: Thank you.

MR. SHARGEL: I think that's all I have.

THE COURT: Let's talk about timing a little bit.

MR. FODEMAN: A few small issues. I spoke to Mr. Shargel about this before, the investigative techniques charge. I don't think Mr. Shargel --

MR. SHARGEL: I don't object to it. I expect it. That's fine.

THE COURT: Mr. Solano, I meant to ask you -- do you have another one.

MR. FODEMAN: There's another sort of bigger ticket item that maybe we can talk about in a second. .

THE COURT: Mr. Solano.

MR. SOLANO: Yes, your Honor.

Beginning first on page 9, the paragraph that begins -- I think it's the second full paragraph, let me turn to the specific count. The second line, you must consider the

evidence separately with respect to this --

THE COURT: Slow down.

MR. SOLANO: You must consider the evidence separately with respect to defendant --

THE COURT: Each defendant.

MR. SOLANO: Each defendant. I know that your Honor in his opening instructions to the jury went into a little more detail in terms of two separate trials, and I'd ask your Honor to consider putting in some language a little bit more than just that one line.

THE COURT: I will. I will put something together that conveys that separate trial, the two-trials-in-one principle.

MR. SOLANO: On line 10. .

THE COURT: Line 10?

MR. SOLANO: Page 10, which has to do with count one. The words Ryan Pemberton. I understand that Miss Irving could be charged with a conspiracy count, but they are not charged with an individual crime as to Ryan Pemberton.

My concern that is the jury my get confused as to why she's not specifically charged as Mr. Simels is separately but she's included in the conspiracy count, particularly in light of the fact that the government moved to dismiss it and I don't know how that's going to get all lumped together.

I don't know if there is something -- that is in the

"thinking out loud" category.

THE COURT: I wouldn't worry about it.

MR. SOLANO: Similarly, your Honor, on page 10, the first paragraph in the existence of an agreement where it says, one person cannot commit the crime of conspiracy alone; rather the proof must convince you that at least two persons -- I understand that that's the law, I don't have a problem with that, Judge, but my concern is that you can -- the jury can find themselves in a position where they find there's enough evidence to convict as to Mr. Simels and feels that the two persons element must include Miss Irving.

So what I would propose is something that reads, after that sentence, a coconspirator -- coconspirator does not necessarily have to be a defendant in this case. .

THE COURT: I think the concern you have is properly addressed by the membership in the conspiracy charge. A minute later I'm going to tell the jury the government has to prove beyond a reasonable doubt that a -- I will change that to the defendant you are considering became a member of the charged conspiracy. I think that will do the trick.

MR. SOLANO: If you take a look, your Honor, at page 15, the first full paragraph that begins the government's allegations that Robert Simels and Arienee Irving attempted to have Selwyn Vaughn testify in the case. You will see first that Selwyn Vaughn is incorrectly spelled, unless it's been

fixed.

THE COURT: Where are you?

MR. SOLANO: The second line of the first full paragraph.

THE COURT: Got it.

MR. SOLANO: The point I really want to address is the issue of Robert Simels and Arienee Irving, and I would suggest -- I would offer to the court the suggestion of maybe putting Robert Simels and/or Arienee Irving.

Again, my concern is that they're going to see this charge lumped together and they are going to think that in order to find either Arienee Irving guilty of something they have to find Robert Simels guilty similarly, and I want to draw the distinction that they could come to separate verdicts as to each specific count.

THE COURT: So you want me to say and/or Arienee Irving?

MR. SOLANO: Correct.

THE COURT: Any objection?

MR. FODEMAN: No, Judge.

MR. D'ALESSANDRO: No.

THE COURT: All right.

MR. SOLANO: On that same page, 15, the second paragraph from the bottom, second line, which begins Vaughn -- Vaughn to have David Clarke either refuse to testify or

testify in conformity with the defense theory. I would suggest that it would say testify falsely in conformity with the defense theory.

THE COURT: Any objection?

Why don't I say refuse to testify or to give false testimony in conformity with the defense theory of the case? That a theory, right.

MR. D'ALESSANDRO: It doesn't have -- no, because even if -- if you have a witness that is about to commit perjury, you can't go up to them, kidnap their kid and say, if you don't get on the stand --

THE COURT: I'm talking about what your case is. I thought your case was, the theory of your case was Vaughn was supposed to go out there and get these people, not just to testify in conformity with the defense theory but to give false testimony for the defense theory.

We're down to brass tacks. The evidence is in. I thought that's what your case was. Are there instances here in which Vaughn is being used to pressure people to give truthful testimony in support of -- I can't think of one.

I understand what theoretically might be available to you, but you already got a record.

MR. D'ALESSANDRO: The truth seeking defense is that you have to solely do lawful conduct to get someone to say something truthful.

At the end of the day, whether or not what the testimony was going to be on the stand was truthful or not, if it was acquired by threats or intimidation, you don't get the affirmative defense; it's still a form of corruptly persuade.

MR. SOLANO: Judge, that is the point. I haven't requested the truth seeking portion.

THE COURT: Are there any facts in the record from which the jury could infer that as to a particular witness someone was threatened or intimidated to give truthful testimony?

MR. D'ALESSANDRO: My point --

THE COURT: Or that there was an attempt to have Vaughn go out to do that?

MR. D'ALESSANDRO: If you credit Simels' testimony that what these people were going to say was truthful, he still doesn't get the affirmative defense. It's still a crime if the jury finds that Selwyn Vaughn was out there to threaten their family or themselves to testify in that way.

THE COURT: What's your answer to that, Mr. Solano?

MR. SOLANO: Judge, it's Mr. Simels' testimony, it's not Miss Irving's testimony. It's not Miss Irving's position.

THE COURT: Let's look at what the statute prohibits. It says knowingly use intimidation, threatens or corruptly persuades another person with the intent to influence or prevent the testimony, or cause a person to

withhold testimony. So as written, the statute doesn't require the government to prove that the influence would be to provide false testimony, right?

MR. SHARGEL: May I say this?

THE COURT: Yes.

MR. SHARGEL: I didn't know this issue was going to come up, but I think there are some cases that I read in preparation for this trial that said that the word corruptly and corruptly persuades involves the notion that it would be false testimony.

I'm not saying that that's the theory of my defense, it's not. But if you squarely raise that question, I believe that there are cases -- and I'm not saying it's the weight of authority, I'm not saying that the Circuit has addressed it -- but I remember I read cases that said exactly that, that corruptly persuade involves payment for -- does not involve payment for truthful testimony.

THE COURT: That only pertains to one means of violating the law, because the corruptly doesn't modify intimidate or threaten.

I don't think we want to go there, the "there" being parsing out the different ways the statute can be violated and deciding which one requires intent to basically create false testimony as opposed to intimidate away from providing true testimony.

I don't think you want to go there either, but if you do, you have to explain to me why here, in this sentence, I should add false testimony when the statute itself, even accepting Mr. Shargel's assertion that there's a judicial gloss when it comes to corruptly persuade, there are other ways to violate the statute that don't require false testimony.

You want to break this out and talk about, on the one hand, intimidation and threatening and on the other corruptly persuading?

MR. SOLANO: I certainly don't want to break it down.

THE COURT: Let's just not add this give false testimony, part. Agreed?

MR. SOLANO: Yes.

MR. D'ALESSANDRO: Yes.

MR. SOLANO: On page 17, count six, second paragraph. The government alleges that Simels and Irving, Miss Irving is not included in count six, that's been dismissed.

THE COURT: Thank you. She's off the verdict sheet right, on that?

MR. D'ALESSANDRO: She's not on the verdict sheet for count six, your Honor.

THE COURT: All right.

MR. SOLANO: On page 20 there's another typo, forgive me if I missed someone pointing it out, but on count ten, the bribery of Leslyn Camacho, it says before you may find either defendant guilty of this crime the government must prove beyond -- two things beyond, the beyond, first beyond should be taken out.

THE COURT: Yes.

MR. SOLANO: Finally, as to the count of bribery of Leslyn Camacho. I know that I have already spoken about the and/or issue on the previous count. I'd ask that it be included in this as well and specifically this count doesn't separate the defendants by name, just says the defendants.

I'd ask that it be separated by name as in the previous counts and included with the and/or. If I'm making myself clear?

THE COURT: I never liked that and/or thing. Now would be a good time, now meaning when I give the charge, and I'm at count ten, to remind them -- I will do another reminder there, I'll he remind you that you are deciding the case separately as against each defendant.

All right?

MR. SOLANO: Fine, your Honor.

MR. SHARGEL: I have one more thing, Judge.

THE COURT: Are you done, Mr. Solano?

MR. SOLANO: One second.

THE COURT: I do think from your perspective less might be more. I was cognizant of the fact that when I'm adding in the theories of the defense it appears that I'm not adding one in for Miss Irving but I can imagine for tactical reasons you would prefer that.

MR. SOLANO: I have nothing further.

MR. SHARGEL: I will confess this is inspired by your Honor. I'm going to ask a charge in connection with counts 12 and 13, that if the sole purpose of either bringing into the United States or possessing the wiretapping equipment was to ensure that the conversations were admitted into evidence, he would be not guilty of that crime.

MR. FODEMAN: I don't think that is the law. That is exactly the problem.

THE COURT: What if the sole purpose were to comply with the prosecutor's request?

MR. FODEMAN: Illegal request.

THE COURT: What, the prosecution's illegal request? Some of them may be prosecutorial discretion.

The reason I asked the question, to the extent there is a specter that -- and I hadn't appreciated the nuances in the negative, but -- and with that disability, I detected a specter of the situation which the prosecutor said, Hey, you got to get this stuff here so we can determine the integrity of your evidence only to play gotcha once it's here.

Now, it may well be that the law permits you to do that, but it doesn't mean I wouldn't consider telling the jury that if the defendants brought the stuff here because the prosecutor asked them to, the sole purpose of bringing it here was to comply with the prosecutor's request, you shouldn't find them guilty.

What would be wrong with that? I mean, if that's the case --

MR. FODEMAN: I could see that.

THE COURT: You get the point?

MR. FODEMAN: I do.

First, it's hard to fathom -- I guess they're going to argue that, but I don't think that necessarily adds up with the evidence that was nuanced and presented to the jury.

THE COURT: Is it a permissible inference?

MR. FODEMAN: It's certainly what Mr. Simels was suggesting in his testimony, that he was doing this to comply with -- I don't think that's what is reflected in the documents necessarily, the timing of it.

THE COURT: I heard his testimony. I saw Paige Peterson's letters and that was really the origin, genesis of my question to you.

I got the feeling that it looked like the government was insisting that this equipment be produced or at least requesting that it be produced, or they would argue that the

tapes made from them couldn't be introduced at the Khan trial.

MR. FODEMAN: I will review those. I think you're right its nuance, but I thought the tenor of that was, hey, where did you come up with wiretap calls? Not we need you to bring us these items tomorrow so we can look at them. But again, I think it may be nuance and we'll look at that.

MR. D'ALESSANDRO: Here's the problem. At the conclusion of Mr. Simels' testimony during the first day, it seemed as though, although it wasn't clear and it was obviously something I needed to flesh out on cross-examination, whether or not the Felix tapes or the David Clarke conversations and overnight the government was in possession of an August 15 proceeding before Judge Irizzary in which Mr. Simels represented that on August 15 he didn't have the equipment, he didn't know where it was, it was in Guyana.

THE COURT: This is Felix.

MR. SHARGEL: Felix equipment.

MR. D'ALESSANDRO: Then what as brought out was that on the first day -- the second day rather of direct examination at the beginning, the testimony was that the disks which were being discussed were the Felix tapes and the Felix tapes were the hard-lined wired equipment in Guyana, making Mr. Simels' representation on August 15 to Judge Irizzary a truthful statement.

Now what we're hearing is that, Oh, no, the Felix

tapes are the David Clarke tapes, which then makes Mr. Simels' statement to Judge Irizzary a false statement and there's been a material shift.

If the Felix tapes are not the David Clarke tapes, and that equipment was in Guyana, and there can be no argument that the government said we want that equipment because what the government was asking for was equipment that Mr. Simels was saying is still in Guyana, this hard-line spliced equipment.

If what he's now saying that is the Felix tapes had the David Clarke conversations on them, which were in the equipment, and I apologize if I'm being confusing with this --

THE COURT: I'm sure it's my fault.

MR. D'ALESSANDRO: Then he did have that equipment with him. The equipment was in his office, both the computers -- we're in October of '07 -- and the base was in the office by June of '07. It makes his statement a false statement to Judge Irizzary.

So I think there's been a change from the conclusion of his testimony to the charge conference.

MR. SHARGEL: May I respond?

THE COURT: Yes. I will take it under advisement.

MR. SHARGEL: The statement on August 15 was not false. Mr. Simels testified, and there is no evidence to the contrary, that he never had the hard wire equipment that

captured the Felix, the police chief's conversations. When the four CDs were turned over, they had Felix and they had the Clarke conversations.

What the government seemed to be interested in, and that's why they got the response they did, that schedule of calls on one number, was not the Felix calls but the Clarke calls.

The Clarke equipment -- I will call it the Clarke equipment, the equipment used to capture the Clarke calls, the equipment we heard about. First the laptop come in October and then the base comes in June, those are the facts.

But in the letters from Paige Peterson, she's asking questions about the equipment that from the numbers she's talking about, she's talking about Clarke calls, and she asks -- I will concede that she doesn't say turn over the equipment to me, she says, can our experts examine the originals? Number one. Number two, what kind of equipment was this recorded on? So there was some question about examining the equipment.

So there was certainly a factual basis on which a jury could infer that this came over to the United States in response to the government's inquiry and to ensure this would be admitted into evidence, coupled with the proposition that I think is beyond dispute, Mr. Simels had no other use or potential use for equipment that, A, was not operable, B,

would not operate on our phone system; there was no reason to have it, it didn't add anything. It didn't give him greater access to the conversations because they were already made from radio waves, as we heard from Mr. Myers and was converted into the laptop. .

THE COURT: All right. You're arguing facts, and that's what you'll argue to the jury, but there is a larger issue. I think the initial reaction to my question was, so what?

I take it your point, when you said that, was even if there was an explicit demand to produce it, it might not be such a wonderful exercise of prosecutorial discretion to bring the charge but the charge sticks. Kind of like a defense lawyer ask asking for the evidence in a child pornography case, you give it to him and then arrest him. Right? It's kind of a crummy case to bring.

MR. FODEMAN: Not a great case.

THE COURT: It may come out in the wash in that the jury, if they believe your version of the facts, Mr. Shargel -- you know, they're not lawyers, they are just going to find him not guilty anyway. I will take under advisement whether to include the charge that they inspired it.

MR. SOLANO: What might be a little bit different with the example that you provided, specifically in this case, we have a simultaneous investigation going on by the same

office into these two attorneys and on the other hand you have prosecutors from the same office asking for this equipment to come in.

So I think it goes a little step beyond just a crummy prosecution, and I think it's just a little bit more than that, because of these two different investigations going on.

THE COURT: You don't have any evidence to support that suggestion. What you're talking about there is -- that's a far more venal act by a prosecutor's office than this crummy exercise of discretion we're talking about.

I take it you're saying either side of the conflict team, one side of the conflict team was working with the other to manufacture a charge?

MR. SOLANO: I'm not saying they were working to manufacture. I'm saying that to cover the specific facts in this case, it could be that it was just negligence, it was more reckless -- nothing intentional, your Honor, I'm not even suggesting that, but I think all I was saying is that in this case the facts in this case are just a little different than the example that your Honor just put forward.

THE COURT: You not only haven't established the intentional creation of a count, you haven't established the negligence creation. That would have to go into the integrity of this conflict team and I'm not satisfied that's a specter I

ought to consider.

MR. FODEMAN: With respect to the equipment, just two last points.

I know they have -- the defense has suggested that there should be language in there about operability, had to work, and we suggested the opposite that it doesn't have to work.

I raise it now because it certainly been sort of a flavor running through the defense that this stuff is obsolete, doesn't work here, and that has some bearing on something.

THE COURT: Was the comment related to the proposed charge?

MR. FODEMAN: In a sense because we propose the jury be instructed that it's of no moment, that the equipment is nonfunctional because the focus should be on the design of it.

So my question is -- we're fine with the charge as it is, but given the argument that I would expect, and given the way the case has been tried, there is a very strong likelihood that the jurors will come back and say does it matter if it works or not?

And I'd like to know before I rebut and make arguments to the jury, is the court going to say, in response to that question, it does matter or it doesn't matter?

In our view it doesn't matter if it's broken or not

because the focus is on the design. The defense says -- for a long time, in their Rule 29 motion, has always maintained that that's crucial. They questioned all the witnesses related to that. Mr. Myers, is it obsolete? Is it broken? Is there an antenna? Is there not an antenna?

If I get up and argue what you just heard from Mr. Shargel is irrelevant, and then your Honor goes and tells them that it is relevant, it's a problem for us. I just emphasize that it's our view that the broken is of no relevance, and we would ask that you include that in the charge.

MR. SHARGEL: This is a big ticket item because I take something different from the charge. I agree with the charge.

You say in the charge when the device was sent, meaning when the actor committed the act -- page 21, its design rendered it primarily useful for surreptitiously intercepting wire, oral or electronic communications. If I'm taking it wrong I guess we should address this now, but my understanding is that it has to be workable at the time that it's sent.

MR. FODEMAN: Then we lose.

THE COURT: If and when we get a jury note -- look at it from my perspective, I got a charge nobody disagrees with. If we get a jury note, I'm going to do what Rule 30 requires me to do every single time I get a jury note. I give

it to you. I'll hear argument and I'll respond to the note.

MR. SHARGEL: The problem I think for both of us, with all respect, I think the problem that exists for both of us is that I would need to know as a defense lawyer -- Mr. Solano would need to know, and I guess the government would need to know -- if I plan on getting up, as I plan to right now -- and I am emboldened by the charge -- to say that this couldn't be used; at the time it was brought into the United States it was already obsolete, as Mr. Myers, the government's own witness testified, and it didn't work.

So if it didn't work, does the government suggest that if this was going to be imported into the United States so it could be put in a telecommunications museum that the museum curator is violating the law with something that doesn't work and is not capable of capturing the conversation?

THE COURT: You want to know whether I'm going to tell you to be quiet?

MR. SHARGEL: I don't want to be charged out of court.

THE COURT: I'm going to give this charge.

MR. SHARGEL: I can live with this charge, fine.

THE COURT: If you want me to catalogue -- the way you began this was this argument would be of no moment -- let's face it, if I were to catalogue in the charge all the arguments on both sides that are of no moment, we'd be here

for a couple of days.

MR. FODEMAN: I understand. I took this charge to mean something completely different. I think we highlighted what I think is a big ticket item here.

THE COURT: These are a barrel of laughs.

MR. FODEMAN: If this is the law as Mr. Shargel pointed out, we lose, there is no reason to send it into the jury, it's Rule 29.

THE COURT: What do you want me to add to the charge?

MR. FODEMAN: This is what we'd like. We proposed this, in order to convict the defendants on this count, you need not find that the device was operable or, in other words, capable of interception at the time the device was mailed; rather, the focus of the inquiry is on whether the design, not the condition of the device, rendered it primarily useful for the surreptitious interception of communications, as I've defined design, primarily useful, and surreptitious.

THE COURT: How is that difference in substance from what I'm charging, at the time of the possession the design rendered it primarily useful for surreptitious interception.

MR. FODEMAN: We're fine with that. I don't think that is Mr. Shargel's interpretation of what you're saying.

THE COURT: We may have a dispute with a jury note. You're both going to make your arguments. You're both fine

with the charge. It's like a Rorschach ink blot for you. What do you want me to do about it? I'm not going to add your language. It's consistent with what is in here. You're happy with the language.

MR. SHARGEL: I'm happy with the language because I interpret it to mean it had to be useful at the time they were either importing it or --

THE COURT: Maybe you will join issue in such a way that produces a note and we'll get to revisit this all again, but unless and until we get to that bridge, I refuse to burn it.

MR. FODEMAN: Just to make these two counts even more annoying, I would propose a request that informs the jury that ignorance of the law is not a defense -- especially if they're going to argue essentially, how was I supposed to know that this was a problem?

MR. SHARGEL: It's not ignorance of the law. The testimony in the case was ignorance of the fact, not ignorance of the law.

THE COURT: Normally this is accomplished, when we talk about knowingly and intentionally, the need for the government to show that the person needed to intend to engage in the conduct that the law forbids, didn't have to be aware of the law itself.

Do I say that here? Where is knowingly and

intentionally?

MR. SHARGEL: Page 8, at the bottom.

THE COURT: Page 8 and the top of page 9.

I will craft some language after the intentionally, the two sentences regarding intentionally, about the key being the defendant need to have intended to engage in the conduct the law forbids, need not be proved that he's aware of the particular law. I will do it generically outside that specific count. You can argue if you want.

Any objection?

MR. SHARGEL: No.

MR. SOLANO: No, your Honor.

THE COURT: What else?

MR. SHARGEL: I'm done.

MR. SOLANO: That's it.

THE COURT: Let's talk about timing. Whose summing up?

MR. D'ALESSANDRO: Me.

THE COURT: How long do you intend to be?

MR. D'ALESSANDRO: I think at the outside two hours, your Honor.

THE COURT: All right. Who's going to go first, you?

MR. SHARGEL: No.

THE COURT: You're going to go first?

MR. SOLANO: Yes.

THE COURT: How long do you intend to be?

MR. SOLANO: An hour.

THE COURT: How about you?

MR. SHARGEL: I'm thinking between 90 minutes and two hours.

THE COURT: All right. That's a total of only five hours.

You're going to rebut?

MR. FODEMAN: An hour on the outside, Judge. Maybe a little over, maybe a little under. It depends what they say.

THE COURT: All right. You don't have to take all the time you discussed, but I'm going to reserve the right at the two hour mark to tell to you collect your thoughts and wrap it up, Mr. D'Alessandro.

I will do it to you at the one hour mark. It's always good to give time back.

MR. SOLANO: How about if I say two hours then, Judge?

THE COURT: You didn't. Same with you, two hours. I won't be unreasonable, I'm not going to cut you off in the middle of it, but roughly I'll ask you to abide by it. The same deal on the rebuttal.

MR. SHARGEL: There's no way I'm going over two

hours.

THE COURT: I'd like to charge them and have them come back and deliberate Tuesday.

MR. SHARGEL: How long do you think it will take, 24 pages?

THE COURT: It will take about 45 minutes.

MR. D'ALESSANDRO: Can I ask for another hour just to be safe? I haven't crafted the summation. My thoughts are two hours, but I was always misestimating how long I thought Selwyn Vaughn's direct was going to take.

THE COURT: I'm not going to be wooden about it, but if I see you're going far into the third hour and it seems like a lot of repetition, I'm going to cut you down.

MR. D'ALESSANDRO: I understand.

THE COURT: I'll be as flexible with all of you, but don't abuse it. I don't want to have the rebuttal summation on Tuesday morning.

One reason to have the summations in one day so you won't be too lengthy to force that to happen, and I don't want you to force it to happen. I don't think you should take three hours. You tried the case in a week. It's not a three hour summation.

MR. D'ALESSANDRO: All right, your Honor.

THE COURT: All right. Have a nice weekend.

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